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Why Instrumentalism Matters

Kyron Huigens^{*}

Abstract

Alon Harel argues that the acts of a public official acting with “fidelity of deference,” are “necessary,” “non-contingent,” “intrinsic,” “constitutive,” integrative,” “expressive,” or “inherent” features of legal punishment. Accordingly, he calls his argument “non-instrumental.” This can be taken as an argument for logical necessity, definition, extension, or modest or immodest conceptual necessity. Only the last interpretation fits Harel’s text, but such an argument fails because instrumentality is necessarily present in any event in the natural world, including punishment. Harel does not say which aspects of natural instrumentality he means to exclude from his argument, or how, or why.

* * *

In *Why Law Matters* Alon Harel argues that rights cannot be separated from the values they protect; that some public goods cannot be delivered by private means; that individuals, but not the state, can act in cases of extreme necessity; that a judiciary must have the final, binding word on the meaning of a constitution; and that judicial review is required because providing a hearing is an ineliminable feature of a lawful state.

The main thrust of each of these arguments is that law cannot be understood in instrumental terms: that rights are not merely means to protecting values; that the state is not merely one possible provider of public goods; that situations of extreme necessity are resistant to rules in a way that necessarily deprives the state of the capacity to act; that the proper guardianship of a constitution is an inherent feature of constitutionalism; that a judiciary is not merely one possible guardian of a constitution but the one indispensable guardian; and that a hearing constitutes judicial review.

A central theme of *Why Law Matters*, then, is instrumentalism versus non-instrumentalism. Concerning punishment, Harel argues that prisons necessarily cannot be run by private contractors, on pain of their not imposing punishment at all, but merely suffering.¹ This is not because private actors might punish in a way that is unjust, whereas public actors are less likely to do so—an instrumental argument—but instead because punishment in a privately run prison is not punishment at all, a non-instrumental argument.² This is so, he says, because punishment must be carried out with respect for dignity. The proper kind of respect for dignity can be paid only by a public official acting according to a

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¹ Alon Harel, *Why Law Matters* 72, 97 (2014). The word “punishment” is limited to legal punishment in both Harel’s arguments and in my arguments here. Punishment inflicted by a parent, for example, is not punishment for present purposes.

² See id. at 68.

particular kind of deliberation: deliberation with fidelity of deference. The deliberations to which a public official faithfully defers are public deliberations that lead to a public practice. According to Harel, a private jailer cannot deliberate with fidelity of deference, and so cannot show the proper respect for dignity that would make his acts punishment.³

Harel's argument against private prisons is agent-centric. He says that public punishment must be imposed by public officials because the imposition of punishment involves judgment as well as action.

To be properly labelled "punishment" under this view . . . it must also reflect an authoritative judgment concerning the wrongfulness of an act, and such a judgment can only be made by an authoritative entity—the state. It is false therefore to say that private individuals *ought not* to punish; they simply *cannot punish*, as their acts do not constitute punishment.⁴

This argument is representative. Harel's non-instrumentalism comes down to the claim that some events and their attendant values do not come into existence at all absent acts of a particular kind as performed by public officials.

It is important to appreciate how strong Harel's claim is. He wants to show, not only that prisons cannot be privatized, not only that this is so because private prisons impose punishment without respect for dignity, not only that respect for dignity requires deliberation with fidelity of deference, not only that punishment imposed without fidelity of deference is not punishment at all, and not only that the value of punishment is not realized in private punishment. Regarding punishment and instrumental explanations, Harel is not making the weak claim that punishment is best explained in non-instrumental terms, but instead the strong claim that any instrumental explanation of punishment is impossible because punishment does not occur as a result of *any means*, nor as a means to *any end*.

In a representative passage, Harel uses the example of blood feuds to explain the concept of "state-centered justifications" that is central to his claim that punishment necessarily cannot be privatized.

To develop a state-centered justification it is necessary to develop a theory of punishment—a theory that will explain that the only agent capable of realizing this value is the state. One indication supporting this conjecture is the earlier observation made, namely that sometimes it is not merely that the act performed by the wrong agent is impermissible, but that it is a different act altogether. A "blood feud" performed by the wrong agent is not a wrongful blood feud; it is not a blood feud at all. Further, the "goods" resulting from a blood feud, namely the redressing of the injustice, can be brought about only when the appropriate agent performs the killing.⁵

This is such a strong claim that the reader might do a double-take—but there it is, over and over again.⁶ Some events and values, such as punishment and dignity, are not real-

³ "Private jailer" is my term, by which I mean a person, natural or legal, who operates a prison operated under contract to the state.

⁴ Harel, *supra* note 1, at 72 (emphasis in original).

⁵ *Id.* at 81.

⁶ Harel makes the argument in several contexts. See *id.* at 69 (public agents and public goods generally), 80 (the "wrong" agent and non-punishment).

ized—they just do not come into existence—unless they are brought about in a particular manner by a particular agent. In other words, Harel does not reject only normative instrumentalism, but also simple causal instrumentality where punishment is concerned, on conceptual grounds.

This section defends the claim that being a public official requires deference and that for an act to count as “deferential” only individuals with certain characteristics—“public officials”—must perform them. Being a public official is therefore not merely contingently conducive to the execution of a task which, in principle, can be performed by anybody; it is conceptually necessary for the very performance of certain tasks, in particular tasks which need to be done “in the name of the state.”⁷

One might think that such a strong claim of conceptual necessity would have to be advanced as an analytical definition of punishment. Harel must mean that punishment is an act of a public official, on pain of not being punishment at all, in the same way that an uncle is a relative of a niece or nephew, on pain of not being an uncle at all. But this is plainly not the case. Harel’s claim about punishment and public officials is not indisputable in this way; it is a controversial claim that he feels compelled to support with arguments.

Another possible reading of Harel’s claim of conceptual necessity is that we infer which acts count as punishment by means of deduction from an *a priori* premise. At each step of the argument Harel might be making deductions such as: If a private jailer cannot deliberate with fidelity of deference, then he cannot show the proper respect for dignity that would make his acts punishment; a private jailer cannot deliberate with fidelity of deference; therefore, he cannot show the proper respect for dignity that would make his acts punishment. But “a private jailer cannot deliberate with fidelity of deference” is hardly an *a priori* truth, and there is no *a priori* truth farther up the line.

Harel often seems to be making a third kind of conceptual argument: an argument about the extension of a concept. An agent-centric argument requires a description of the relevant agent, in this case a public official. Harel says that being a public official is not a matter of definition. “Nothing in this argument turns on a formal definition of ‘public official’ or ‘private employee’; the spectre of tautology in this respect is hence groundless. Executors are ‘public officials’ by virtue of being participants in the process.”⁸ If whether or not an act counts as punishment depends on its being performed by a public official, and if who is and is not a public official is not a matter of definition, then what makes an act count as punishment also is not a matter of definition. The question Harel has raised, then, is not the meaning of “punishment” or “public official,” but instead which acts, committed by whom, count as punishment and which do not. In other words, his conceptual argument concerns the extension, or the coverage, of the concepts “public official” and “punishment,” instead of their intension, or meaning.

⁷ Id. at 87.

⁸ Id. at 93.

There is at least one good reason to think that Harel's argument about public officials and punishment is an argument about extension: this is the kind of argument he makes concerning public agency in general.⁹ The terms of the Federal Activities Inventory Reform (FAIR) Act require a determination of which acts count as inherently governmental activity. The Act provides a definition, but, as Harel notes, it also provides a multi-part description of such acts. That is, the Act states the extension as well as the intension of "inherently governmental activity." Harel says that punishment can be identified as an inherently governmental function in the same way.¹⁰

Unfortunately, an argument about the extension of "punishment" does not support Harel's thesis that a private party cannot impose punishment. The extension of an act or occurrence such as "punishment" or "inherently governmental function" is judged according to its distance from a central case. H.L.A. Hart described the central case of punishment this way:

I shall define the standard or central case of "punishment" in terms of five elements:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offense against legal rules.
- (iii) It must be of an actual or supposed offender for his offense.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

In calling this the standard or central case of punishment I shall relegate to the position of sub-standard or secondary cases the following among many other possibilities:

- (a) Punishments for breaches of legal rules imposed or administered otherwise than by officials (decentralized sanctions).
- (b) Punishments for breaches of non-legal rules or orders (punishments in a family or school).
- (c) Vicarious or collective punishment of some member of a social group for actions done by others without the former's authorization, encouragement, control or permission.
- (d) Punishment of persons (otherwise than under (c)) who neither are in fact nor supposed to be offenders.¹¹

It might appear that Hart agrees with Harel that privatized punishment is not public punishment, because in section (v)(a) Hart classes punishment "imposed or administered otherwise than by officials" with a clear case of non-punishment: non-public punishment

⁹ See *id.* at 74-75.

¹⁰ See *id.* at 73-74.

¹¹ H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in *Punishment and Responsibility: Essays in the Philosophy of Law* 1, 4-5 (2d ed. 1968).

“in a family.” Hart’s reference is, arguably, a reference to the exercise of authority by non-public officials that in Harel’s view makes private punishment non-punishment.

In order to fall outside the central case of punishment, however, punishment would have to be “imposed or administered otherwise than by officials” at most stages of the proceedings. Harel’s principal example of non-punishment in the sense he means—being put in solitary confinement for a violation of prison rules—is not such a case.¹² If a person is arrested by a patrol officer, interrogated by a detective, indicted by a grand jury, arraigned and denied bail by a magistrate, brought to trial before a judge, convicted by a jury, and sentenced by a judge with the aid of an investigation and report by a parole officer, then this person’s case is one of punishment. If, at the end of all that, a prisoner in a privately-run prison is placed in solitary confinement as punishment for intramural wrongdoing, his case does not cease to be one of punishment.

To see this point more clearly, consider the extension of punishment in a case with a different missing feature. Many American police officers have come to consider themselves judge, jury, and executioner in the way that they carry out their jobs. One penalty they inflict, usually for a trumped up accusation of “resisting arrest” or “failure to comply with a lawful order,” is electrocution with a taser.¹³ This electrocution could plausibly be characterized as unjust legal punishment. It is pain imposed by an authority constituted by a legal system for a violation of an offense against legal rules, done in an immoral way. On closer examination, however, these cases must be characterized as non-punishment, not unjust punishment. The pain these officers inflict is not done under the authority of a valid judgment and sentence. Because they lack this feature, taser cases fall outside the central case of punishment.¹⁴ In contrast, punishment in a privately-run prison is not non-punishment, because discipline by a private jailer still falls quite close to the central case of punishment. The prisoner would not be in a prison of any kind but for his being given a valid sentence obtained through a long course of action by public officials.

The best construction of Harel’s non-instrumentalism is that he is making a modest conceptual argument, in Frank Jackson’s terms.¹⁵ Harel says that he is attempting to build on an intuition regarding private punishment. This intuition is that punishment inflicted by a person acting in his private capacity is morally presumptuous (my term) such that a prisoner can ask, “Who are you—a private citizen, no better than I am—to punish

¹² See Harel, *supra* note 1, at 91-93.

¹³ See, e.g., *Michaels v. City of Vermillion*, 539 F. Supp. 2d 975, 977 (N.D. Ohio 2008) (denying summary judgment for defendants where police were alleged to have tasered suspect-plaintiff twenty-five times, including on the testicles), 987 (distinguishing cases of resisting arrest); see also *Orem v. Rephann*, 523 F.3d 442, 445 (4th Cir. 2008) (suspect-plaintiff tasered because “You need to respect us.”).

¹⁴ Hart does not list “pursuant to a valid judgment and sentence” in his list of features of a central case of legal punishment. It should suffice to say that Hart was not infallible.

¹⁵ See Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* 42-44 (1998).

me?”¹⁶ In general, Harel is trying to give a philosophical account of intuitions about punishment and its related values.¹⁷

As Jackson describes it, conceptual analysis begins with intuitions about a matter, and with the shared intuitions that constitute the “folk theory” of the matter.¹⁸ These intuitions are then refined. For example, criminal law scholars have refined blameworthy “intention” into several varieties: it can be an objective, an awareness, or advertent carelessness. Conceptual analysis then proceeds in a way that is familiar to legal reasoners: conceptions are run up against possible cases. The point of this exercise is to see how a particular conception would fare in the real world—to see whether it fails to include features that we cannot do without; to see whether unintended or undesirable consequences will follow; or to see whether it is just too implausible to take back to the folk for their approval, so to speak.¹⁹

From this perspective, conceptual analysis is predominantly an a posteriori inquiry, an essentially sociological exercise that takes acts and consequences into account.²⁰ Harel is engaged in modest conceptual analysis, in Jackson’s terms, if he wishes to provide only a clarified version of our intuitions about what a public official is—including our intuition that a public official occupies a position that is morally superior to a private jailer, relative to a prisoner. Conceptual analysis as an a posteriori inquiry would allow Harel to face down the “spectre of tautology,” as he hoped to do with his functional account of “public official.” Only a public official has a persuasive answer to the prisoner’s question, “Who are you to punish me?”

Or so Harel’s intuitions tell us. Whether Harel’s intuitions on these matters are widely shared is difficult to tell, but the possibility that they are not widely shared should concern him. Modest conceptual analysis seeks to clarify folk intuitions, which means that it matters how widespread intuitions are. If the intuitions taken as the subject matter of conceptual analysis are not widespread, then conceptual analysis is not modest at all. It is, instead, an effort to persuade people to abandon their intuitions for someone else’s, on the premise that they have got it wrong where the nature of the world is concerned.²¹ And Harel’s conceptualism often seems to be immodest. He seems to want to shift the reader’s intuitions to match his own. Without the backing of some serious sociology, however, this is an immodest conceptualism—an effort to say how, conceptually, the world is—and it puts Harel in the position of having to advance a priori, deductive, or extensional arguments.

Many of Harel’s arguments about punishment are vulnerable to the charge of immodest conceptualism. Many people do not share the intuition that respect for dignity is a

¹⁶ See *id.* at 54, 98-99.

¹⁷ See Harel, *supra* note 1, at 68, 78-80.

¹⁸ See Jackson, *supra* note 15, at 31-37, 68.

¹⁹ See *id.* at 37-42.

²⁰ See *id.* at 28-37, 46-52.

²¹ See *id.* at 43-44.

necessary feature of punishment. A large segment of American popular opinion and plenty of American public officials see degradation as a necessary feature of legal punishment.²² Dignity also is not a value that is entrenched in public punishment. To say a value is “entrenched” is unlike saying that it is “intrinsic” or “inherent.” Entrenchment is an empirical, sociological claim.²³ The American experience of widespread, and apparently deliberate, degrading public punishment speaks volumes to the contrary.²⁴ It is pleasant to imagine that conceptual analysis might rid us of other people’s primitive intuitions and offensive beliefs, but this is a job for immodest conceptualism—showing that widespread folk intuitions are simply wrong about the nature of the world—and Harel does not carry that heavy burden.

The problem with Harel’s conceptual project is that it relies on intuitions to begin with. Brian Leiter is a prominent critic of conceptual analysis in legal theory, so let me attempt to convey the gist of his objections to the conceptual analysis of intuitions.²⁵ To say we test the intuitions behind concepts against possible cases is incorrect. Instead, we test the intuitions behind concepts against our intuitions about possible cases. Without empirical work, conceptual analysis never leaves the world of intuition, and this is a bad place to be. Beyond the obvious questions of “whose intuitions” and “which intuitions,” there is the fact that intuitions—beliefs that are unreflective, probably biased, and possibly infected by magical thinking—are a poor starting point for even the most rigorous analysis. In the end there is the unavoidable possibility that everyone’s intuition is wrong, because we are confined to a point in history at which we are not likely to have the facts, methodology, or theory needed to formulate an adequate conception of any given matter. All conceptions of the concept “ether” as an immaterial medium for cause and effect were wrong because everyone’s intuitions about “ether” were entirely unfounded.

Leiter’s recommendation is to give up on intuitions altogether and follow the alternative course of philosophical naturalism, especially as it is carried out in the natural sciences. As Leiter describes this naturalistic methodology:

Kant took it to be *a priori* that space necessarily had the structure described by Euclidean geometry; subsequent physics showed his intuitions to be wrong The moral natural-

²² See Michael Tonry, *Thinking About Crime: Sense and Sensibility in American Penal Culture* 141-67 (2006) (quoting Dan Kahan, *The Anatomy of Disgust in Criminal Law*, 96 Mich. L. Rev. 1621 (1998)) (describing punishment policies that were once “unthinkable,” including punishment as debasement).

²³ Cf. Harel, *supra* note 1, at 66 (alleging the entrenchment of concern for the public provision of goods in legal doctrine), 72-73 (alleging the entrenchment of a concern for the moral and political significance of agent identity in the legal system).

²⁴ See William Finnegan, *Sheriff Joe*, *New Yorker*, July 20, 2009 (<http://www.newyorker.com/magazine/2009/07/20/sheriff-joe>) (profile of Arizona sheriff who imposed degrading conditions in a Maricopa County jail); *The Farm: Angola, USA* (Gabriel Films 1998) (documentary film showing degrading conditions in a Louisiana prison).

²⁵ Cf. Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 121, 131-35 (2007) [hereinafter *Naturalizing Jurisprudence*]; Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, in *id.* at 153, 175-81.

ists draw from this history is that the only sound reason to prefer one metaphysical or epistemological picture over another is not because it seems intuitively obvious . . . but because it earns its place by facilitating successful *a posteriori* theories of the world. Kant's—and everyone else's—intuitions be damned, it just turned out that physics had a use for non-Euclidean accounts of the structure of space. Philosophy, on this naturalistic story, has no special methods for investigating the world; it is simply the abstract and reflective part of empirical science.²⁶

Regarding the philosophy of law, and on the concept of law in particular, Leiter concludes that “this same approach would mean taking seriously the enormous social scientific literature on law and legal institutions to see what concept of law figures in the most powerful explanatory and predictive models of legal phenomena such as judicial behavior.”²⁷ For Harel on the concept of punishment, this means taking seriously the social science on punishment, and looking for the most powerful explanatory and predictive models of the phenomenon of punishment. As it happens, some of the most interesting work in the philosophy of punishment takes just this tack.²⁸ Harel does not.

At this point, I might try to draw on this literature to recommend a new scholarly agenda for Harel. This effort, of course, would be presumptuous and probably doomed to failure. I propose instead to draw one implication from Leiter's proposed reorientation of legal philosophy, and to consider Harel's arguments from that perspective. The implication I have in mind is probably obvious to the reader. A social scientific approach to the philosophy of punishment will be limited to providing instrumental explanations. I propose to consider Harel's arguments in the philosophical mode of “the abstract and reflective part of empirical [social] science,” and to try to explain why Harel's arguments cannot escape instrumentalism.

Instrumentality is unavoidable. Closing the prison door is an instrumental means to imposing punishment—as is pounding a gavel to cause a loud noise to signal that court is in session, as is shackling the prisoner to cause him to stumble if he tries to escape, and so on. But if bare instrumentality is unavoidable in discussions of punishment, then what does it mean to reject instrumental explanations in the way that Harel does? We have to read him as saying something along the lines of “causal instrumentality *C* is explanatorily irrelevant to *x*.” And causal instrumentalities such as those I have mentioned are irrelevant to the explanations of law and morality in this sense: “Where a moral or legal choice must be made, we do not point to causal instru-

²⁶ Id. at 180.

²⁷ Id. at 184.

²⁸ See, e.g., John Bronsteen et al., Happiness and Punishment, 76 U. Chi. L. Rev. 1037, 1037 (2009) (“When the state punishes a criminal, it inflicts suffering.”); Adam Kolber, The Subjective Experience of Punishment, 109 Colum. L. Rev. 182, 212-13 (2009) (“[T]he subjective disutility of punishment is not some mere after effect of punishment. Rather, it is largely or entirely the punishment itself. Subjective disutility is a necessary component of retributive punishment and constitutes, if not the sole reason for retributive punishment, certainly a major part of it.”). This work is not empirical psychology or sociology, but is, instead, about the significance of such empirical work to the theory of punishment. For example, the subjective experience of punishment is portrayed as critical to an understanding of the retributive rationale for punishment.

mentalities such as *C* as reasons that justify our choice.” In contrast, an explanation that does point to our taking some causal instrumentality as a justifying reason is an instrumental explanation. For example, to invoke deterrence as an argument for punishment is an instrumental explanation of punishment because punishment’s dissuading a person from committing a crime is a causal instrumentality, and we invoke this causal instrumentality as a justifying reason for punishment in this explanation.²⁹ Justification of punishment by deterrence is the kind of justification that Harel rejects in favor of non-instrumental justifications.

Harel explains Israel’s decision not to privatize prisons as a choice made for non-instrumental reasons.³⁰ The Israeli court relied only on respect for human dignity in making its decision. According to Harel, respect for human dignity is a non-instrumental justifying reason for punishment. How so? Harel’s conception of dignity is a “mode of operation” conception, which, he says, does not make dignity turn on which values it protects, but instead on how it protects the values that it does.³¹ His first argument along this line characterizes dignity in operational terms as an “expressive norm.”³² This is plausible. If we do not invoke the causal instrumentality of respect for dignity as a justifying reason, then we do not take dignity to operate as an instrumental justification for punishment. If we do not do this, then it must be the bare expression of dignity, and not the effects of that expression, that operates as a justification. And, because it does not invoke causal instrumentality as a justifying reason, dignity as an expressive norm must be non-instrumental.

The problem with this argument is that expressions of value do have causal instrumentality—unavoidably so. More important, we can and do invoke this causal instrumentality as a justifying reason where punishment is concerned. Of course, we need not do so. We can prefer to construe expressions of value in non-instrumental terms. Recall, however, that Harel’s claim about punishment and non-instrumentalism is a strong one. Some acts, events, and values are not realized—they just do not come into being—if our reasons are instrumental. To punish for instrumental reasons is always the wrong way to go about things if we want to bring punishment into existence. Instrumental punishment is impossible because punishment does not occur as a result of *any means*. The realization of punishment is a conceptual matter of who acts and why, and our intuitions about which acts, done by whom, respect dignity.

Harel’s argument is unpersuasive because we have no reason to think that respect for dignity is always, necessarily, a non-instrumental justifying reason. We can, with Harel, construe dignity as a mode of operation and take this operational mode to be expressive. But the expressive mode is no less an instrumental mode of dignity than it is a non-

²⁹ Cf. Harel, *supra* note 1, at 77-78 (describing “instrumentalism” generally, and the instrumentalism of law and economics analysis specifically).

³⁰ See *id.* at 76-77.

³¹ See *id.* at 60.

³² See *id.*

instrumental mode. For example, expressive value serves prominently in Dan Kahan's writings on punishment, and it does not operate there as a non-instrumental reason. In Kahan's view, expressions of value are causally instrumental in encouraging or discouraging crime, and we should direct this causal instrumentality toward deterring crime more effectively.³³

Kahan does not leave respect for dignity out of this picture. Dignity, like other values, is a construction of social norms, and public institutions such as law enforcement agencies can express these values well, poorly, or not at all.³⁴ Law enforcement policies that express values in a distorted way—such as the indignity of being law-abiding when, due to others' unpunished violations of law, one appears to be a dupe of the system—undermine the deterrent value of the criminal law.³⁵ Deterrence is an instrumental *and* expressive mode of operation for dignity. Furthermore, in spite of its being an instrumentalist argument for deterrence, Kahan's argument is about how value is protected in law, not what is protected. To protect the dignity of offenders and their victims by means of criminal law, but to do so in a way that makes dupes of conscientious people, is not to protect dignity.

There is nothing counterintuitive about Kahan's expressivist and instrumental picture of the protection of dignity in punishment, so there is no reason to think that the concept of dignity or of punishment rules it out. This is not the mode of operation that Harel prefers for dignity, but to characterize the operation of dignity as being expressive is not enough to rule it out as a conceptual matter. If Harel's claim is that dignity cannot operate as an instrumental norm in spite of widespread intuition, this is an immodest conceptual analysis, and it is not persuasive. It is likely to fall well short of convincing people with contrary intuitions that they should abandon theirs for his.

Similarly, Harel points out that the communication of condemnation for public wrongs has been widely recognized as a justifying reason for punishment, and then takes the communicative function of punishment to be a non-instrumental reason for punishment.³⁶ The problem is that communication is a caused effect. If punishment ever succeeds in communicating condemnation, then this must be because a punitive means of communication—hanging, for instance—is causally instrumental in making the condemnation of punishment understood. In other words, when we communicate condemnation by means such as hanging, this communication is one of the causal instrumentalities that are part of punishment simply by virtue of our living in a world of cause and effect.

As I read him, Harel says we are mistaken if we take this causal instrumentality to be a justifying reason for punishment. But we have no reason not to do so. If the communication of condemnation by the causal instrumentality of hanging is a reason for punishment—as it is in the communicative theories Harel cites—then why must we re-

³³ See, e.g., Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349 (1997).

³⁴ See *id.* at 362.

³⁵ *Id.* at 391.

³⁶ See Harel, *supra* note 1, at 81.

frain from proffering the acts of private jailers as means of communicating condemnation?³⁷ Harel apparently has no objection to taking the communication of condemnation by means of hanging as justifying reasons for punishment, presumably because this has some intuitive appeal. But then why is the communication of condemnation by means of the acts of private jailers counterintuitive? The fact is that it is not counterintuitive—which means that Harel has a heavy burden to carry in his conceptual analysis, even if it is construed as modest conceptual analysis.

Regarding the non-instrumental, expressive operation of punishment imposed with fidelity of deference, Harel has said that he means to describe the relationship between dignity and punishment as one of non-contingency: punishment cannot have only a contingent relationship to dignity.³⁸ By “non-contingent,” Harel seems to mean that punishment serves some value in a way that is not dependent on some intervening act or event that might or might not occur. Public punishment serves the value of dignity in a non-contingent way because the dignity we find in public punishment does not depend on any other event. Public punishment preserves the dignity of the offender just because it is public, in the sense of being done by a public official acting with fidelity of deference toward a public practice of punishment. In contrast, deterrence is a contingent value of punishment because it depends on the punishment being severe, being certain, and being known by the potential offender, and on the success of these effects in causing the further effect of lowering the crime rate—none of which is certain to occur.

If this is a correct reading of “non-contingent,” then the obvious question is, which intervening acts and events are included in the relationships between punishment and values such as dignity or deterrence, and which are left out. We live in a world of cause and effect, and causal instrumentality is unavoidable. Any *relevant* intervening event is not merely an event, it is a cause—of dignity, perhaps, or perhaps of some other effect. The severity and certainty of punishment, and potential offenders’ awareness of punishment are causes of deterrence. So are the locking of a cell door, the sound of the judge’s gavel, the shackling of a prisoner, and countless other events. But *most* of these events have no less a causal connection to dignity and its preservation—empirical features of societies—than they do to deterrence. We unlock a cell when its toilet is overflowing; court is not called into session only after the defendant is prostrate on the courtroom floor; we do not incapacitate a male prisoner for transport by tying a wire around his genitals. *But for* our rejection of such practices, dignity in punishment would not be realized. Public punishment, dignity, and deterrence all occur in the world’s causal flow, and nowhere else. Why should we ignore cause and effect where dignity is concerned but not where deter-

³⁷ Antony Duff, for example, prefers the term “communicative” to “expressive” because the former term recognizes that punishment appeals to reason, instead of merely causing certain behavior. See Antony Duff, *Punishment, Communication, and Community* 79 (2001). But this does not rule out simple causal instrumentality, because it cannot do so. Communication is no less caused and a cause than expression is. See *id.* at 81 (“The demand that I respect her as a moral agent determines the ends I can pursue, as well as the means by which I can properly pursue them.”).

³⁸ See Harel, *supra* note 1, at 73, 79-80.

rence is concerned? Why suppose that we can we take dignity, but not deterrence, out of the world's causal flow? Do we have any intuitions that recommend doing this, never mind requiring it as a conceptual matter?

The principal reason not to abandon instrumentalism in understanding law is that to do so would amount to foregoing the most powerful explanatory method we have, which is not the refinement of intuitions into concepts, but the naturalistic methodology behind science. Our intuitions about Euclidean space be damned, as Leiter says, physics found a use for non-Euclidean space. In this, he follows W.V.O. Quine, whose work is central to the methodological naturalism that Leiter prefers to conceptual analysis.³⁹ Quine argued that analytical propositions—those that seem true by virtue of meaning, such as that an uncle is a relative of a niece or nephew—are ultimately indistinguishable from statements about how things are, or synthetic propositions. An uncle is a relative of either a niece or nephew, but if experience tells us that gender identity is not bivalent, then an uncle can also be a relative of both a niece and a nephew, or a relative of neither a niece nor a nephew.

Quine also argued that the reference and extension of terms is not determined in a necessary way, but always causally, by contingent social conventions. And Quine argued that, since we always have a choice to reject the theory or to reject the fact when they conflict, theory is not independent from fact. They are interdependent parts of a web of belief. If these things are true, then “we can never do better than occupy the standpoint of some theory or other, the best we can muster at the time.” And by “some theory or other,” Quine meant naturalistic theories. As Leiter sums it up:

“In my naturalistic stance,” says Quine, “I see the question of truth as one to be settled within science, there being no higher tribunal.” But science . . . [is] the highest tribunal *not* for any a priori reasons, but because—to speak crudely, but not inaccurately—science has, as an a posteriori matter, “delivered the goods”: it sends the planes into the sky, eradicates certain cancerous growths, makes possible the storage of millions of pages of data on a tiny chip, and the like.⁴⁰

Science being a matter of providing instrumental explanations, we have good reason to think that instrumentalism is a superior method to conceptual analysis, especially to one that claims to show that a social institution as adamant as punishment does not come into existence at all absent the right actors' acting in the right way.

Science is not a normative practice, of course, but its naturalistic methodology can also be the methodology of moral and legal practice. The best example of this normative methodology is to be found in the naturalistic moral realism of Richard Boyd.⁴¹ Boyd's

³⁹ See Brian Leiter, *Why Quine Is Not a Postmodernist*, in *Naturalizing Jurisprudence*, supra note 25, at 137, 144-45.

⁴⁰ Brian Leiter, *Objectivity, Morality, and Adjudication*, in *id.* at 225, 231.

⁴¹ See Richard Boyd, *How to Be a Moral Realist*, in *Essays on Moral Realism* 181 (Geoffrey Sayre-McCord ed., 1988); see also Richard Boyd, *Constructivism, Realism, and Philosophical Method*, in *Inference, Explanation, and Other Frustrations: Essays in the Philosophy of Science* 131 (John Earman ed., 1992);

view of science is virtually indistinguishable from Quine's. Boyd also emphasizes causal reference, theory dependence, and the unmatched instrumental success of science. Unlike Quine, however, Boyd has advanced a naturalistic moral realism based on the family resemblance between morality and science in these respects, and this metaethics is the model of a naturalistic theory of normative practice. This is not the place to explain or defend Boyd's realism and the legal theory it implies. I intend only to report that we have such a theory available to us. It meets Leiter's criteria for the elements of a naturalized jurisprudence (though Leiter himself is by no means a moral realist), and naturalized jurisprudence avoids reliance on intuitions and the weaknesses of conceptual analysis that plague Harel's theory. But of course it also makes Harel's rejection of instrumentalism impossible.

Harel needs to make a far better case than he does for foregoing instrumentalism in our efforts to understand of public institutions such as punishment. His extreme non-instrumentalism commits him to saying that we do not take causal instrumentalities as justifying reasons for belief or action. Acts such as punishment and values such as dignity *must* be seen as bearing necessary,⁴² non-contingent,⁴³ intrinsic,⁴⁴ constitutive,⁴⁵ integrative,⁴⁶ expressive,⁴⁷ or inherent⁴⁸ relationships to one another—but *never* a relationship of cause and effect. This is all extremely counterintuitive—which is a bad place to begin a conceptual analysis that aims, at best, to refine intuitions.

Richard Boyd, Realism, Approximate Truth and Philosophical Method, in *Scientific Theories* 355 (Wade Savage ed., 1990).

⁴² See Harel, *supra* note 1, at 86.

⁴³ See *id.* at 72-73.

⁴⁴ See *id.* at 69, 95, 97.

⁴⁵ See *id.* at 80.

⁴⁶ See *id.* at 67, 92.

⁴⁷ See *id.* at 60.

⁴⁸ See *id.* at 75.